93-1076

NO. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANKLIN M. WRIGHT, Administrator Of The Estate Of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., DAVID A. DAVIS, M.D., DAVID GREENE, M.D. and CHRISTOPHER WALLS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia Decision

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80 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution of the State of Georgia of 1983 is unconstitutional as it sets out in the Preamble, to perpetuate the principles of free government and to promote the interests and happiness of the citizens of the State of Georgia without mention of its being subsidiary to the Constitution of the United States and specifically to the Fourteenth Amendment thereof, and further lacking in any statements as to the powers of the state being set out and given thereto by the Constitution of the United States.

2. Does the actions and enforcement of the Constitution of the State of Georgia of 1983, by the Court of Appeals of the State of Georgia, and the refusal to

accept certiorari by the Supreme Court of Georgia, and thus upholding the decision of the Court of Appeals of the State of Georgia in the instant case involving the diversity of citizens, ie. the Petitioner a resident of Michigan, and in view of the Preamble to the Constitution of the State of Georgia of 1983, then show greater flagrant emphasis by said court to the reading of Article 1, S 1, P 1, of the Constitution of the State of Georgia of 1983, as to protection to persons and property of Georgia being the paramount duty of the government of Georgia, to which the court is sworn, thus depriving the Petitioner the right of the equal protection of the Fourteenth Amendment of the Constitution of the United States?

3. Whether the Georgia Court of Appeals in upholding the Trial Court's decision

and the subsequent denial of certiorari by the Georgia Supreme Court exceeded their discretion as to the requirements and permissive discretion of the Official Code of Georgia Annotated Section: 9-11-38, depriving the Petitioner of the protection of the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States as to: due process, the right to a trial by jury, and equal protection as to diversity of citizenship, where the record reflected that the Petitioner was a resident of the State of Michigan, and the Respondents/Defendants at trial were residents of the State of Georgia.

4. Whether the Official Code of Georgia Annotated Section: 9-11-9.1 creates a defense in bar which is arbitrary and capricious, violating both substantive

and due process of law, thus being unconstituional, violating the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Whether the Official Code of Georgia Annotated Section: 9-11-9.1 creates a special class which is overly broad and which discriminates and as such is arbitrary and capricious as to its construction and subsequent application, thus being unconstitutional, violating the equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

6. Whether the Official Code of Georgia Annotated Section: 9-11-9.1 by taking away professional medical malpractice claimants' property right to a remedy through the courts from the special class - medical professionals, who are the

proximate cause of the injury or negligent act, are not the claimants specifically deprived of substantive due process as in fact guaranteed by the Constitution of the United States?

LIST OF ALL PARTIES

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As 28 U.S.C. s 2403(b) may be applicable:

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Superior Court of Fulton County, State of Georgia, Civil Action File No. D-90848, Christine Wright vs. Crawford Long Hospital of Emory University, John K. Schellack, M.D., Christopher Dooley, M.D., M. Edwyn Harrision, III, M.D., William A. Davis, M.D., David Greene, M.D., and Christopher Walls, M.D..

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STATEMENT OF JURISDICTION

The jurisdiction of this Court, comes forward from the final decision of the State of Georgia's court of last resort, the State of Georgia Supreme Court, which, on reconsideration, on October 1st, 1993, denied the Petitioner's Motion For Reconsideration and thereafter informed the Court of Appeals of the State of Georgia, which then transmitted to the trial court the Court of Appeals' remittitur.

Further, wherein said court of last resort, the Supreme Court, of the State of Georgia, by its actions has decided an important question of federal law which has not been decided by this Court, and may in fact conflict with applicable decisions of this Court, as to the

constitutionality of its state constitution and a state statute is in conflict with the Constitution of the United States and/or application, interpretation, and/or implementation of its state constitution and or statute, contrary to established federal law, and the Constitution of the United States, and wherein the further conflicts as to construction and/or application, interpretation, and/or implementation of a state statute, thus jurisdictional ground for this Honorable Court is established.

STATEMENT OF THE CASE

This petition for Writ of Certiorari arises out of the performance of an act or acts of medical malpractice committed upon the Petitioner, on or about July 3rd, 1989, by the Respondents.

The Petitioner filed her Professional Malpractice Complaint on June 27th, 1991, in the Superior Court of Fulton County of the State of Georgia, in accordance with the appropriate State of Georgia Statutes, and more specifically the Official Code of Georgia Annotated Section: 9-11-9.1, to the best of her knowledge and understanding thereof. In accordance with O.C.G.A. 9-11-9.1, the Petitioner submitted with her complaint, the sworn affidavit albeit the deposition of her personal medical doctor, Dr.

Pamela Benitez of the State of Michigan, the state of residence of the Petitioner at the time. The complaint was filed within 10 days of the statute of limitations running. Via the U.S. Mails, on June 28th, 1991 the Petitioner filed an amendment to her complaint, alleging that in accordance with O.C.G.A. 9-11-9.1(b) that her complaint had been filed within 10 days of the statute of limitations running and that she was unable to supply an affidavit of a medical doctor as to the allegations of her complaint, and was in accordance with the statute, invoking the 45 day period within which to file the additional medical doctor's affidavit. The court received and filed the amendment, July 1st, 1991, still prior to the actual date of the statute of limitations running. Respondents were served with the Summons,

Complaint and subsequent amendment and answered in due course. On August 7th, 1991, within the allowed 45 day extension period, the Petitioner filed her second amendment to her complaint, stating that in accordance with O.C.G.A. 9-11-15 and O.C.G.A. 9-11-9.1, amended her complaint, by adding thereto, the sworn affidavit of Jose L. Evangelista, M.D.. Dr. Evangelista was a medical doctor, licensed by the State of Georgia, who had reviewed the available medical records of the Petitioner. Dr. Evangelista, did not have an opportunity to review the admission x-rays of the Petitioner, to the Respondent Hospital, due to its failure to make same available.

Respondent Schellack, was served with Summons and Complaint on July 1st, 1991. He filed his answer on August 2nd,

1991, and had the Petitioner served with his Motion to Dismiss for failure to comply fully with O.C.G.A. 9-11-9.1, on August 5th, 1991.

On August 2nd, 1991, Attorney J.M. Hudgens IV, P.C., representing three of the Respondents, issued a letter to the Petitioner's attorney, threatening an action for abusive litigation against the Petitioner and her attorney. The basis for his threat was the enclosure of the missing Respondent Hospital's admission x-ray which clearly showed the existence of the fifty centimeter catheter lead wire inside of the Petitioner's body. This was further noteworthy in that it was an actual admission to one of the counts of the initial complaint, that the Respondents had knowledge of the wire within the Petitioner's body and failed

to warn and failed to remove the wire, thus discharging the Petitioner with the fifty centimeter catheter lead still in her body but, without her knowledge of same.

Having filed her appropriate amendment consisting of the sworn affidavit of Dr. Evangelista, within the allowable 45 day period from the original date of her filing her professional medical malpractice complaint and in accordance with the provisions of O.C.G.A. 9-11-9.1, the Petitioner filed her response to the Respondent's motion to dismiss, on September 2nd, 1991, stating same.

On September 11th, 1991, the Petitioner filed a supplemental response to the Respondent's motion to dismiss. In her supplemental response, she alleged

that O.C.G.A. 9-11-9.1 was unconstitutional. Her allegations were initially based on the Constitution of the State of Georgia, Art. III, Sec. V. Par. III, which states: "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof." Mayor of Savannah v. State ex rel Greed, 4 Ga. 26 (1948), The purpose of this constitutional provision is to protect against surprise legislation. Mead Corp. v. Collins, 258 Ga. 239, 367 SE2d 790 (1988). O.C.G.A. 9-11-9.1 totally fails in this regard. The Petitioner further alleged that the statute did not warn of the dire substantive consequences which would result from the failure to follow administrative requirements exactly. The Petitioner further stated that: "the

language of the statute is so vague that persons of ordinary intelligence are forced to guess at its meaning. Such guesswork is at that persons' peril. Any defects in the affidavit are not amendable and, thus, the effects of the statute become capricious and arbitrary. A plaintiff who guesses wrong would be irrevocably out of court. Certainly this violates all notions of fair play and substantial justice."

On September 13th, 1991, the Trial Court issued an Order, stating that: "upon full consideration of the record, Defendants' Motion to Dismiss is hereby GRANTED." The Court further stated in its last paragraph: "We therefore GRANT the Defendant's Motion for Summary Judgment and DISMISS the Plaintiff's Complaint for failure to comply with

O.C.G.A. 9-11-9.1.

On October 2nd, 1991, the Petitioner filed her Notice of Appeal with the Trial Court to the Supreme Court of Georgia rather that the Court of Appeals, due to jurisdiction over the case being that of the Supreme Court pursuant to the Constitution of the State of Georgia, as to the constitutional questions raised as to O.C.G.A. 9-11-9.1 and the implementation of same by the Trial Court.

On February 12th, 1992, the Supreme Court of Georgia transferred the case to the Court of Appeals, stating that they did not have jurisdiction.

On February 21st, 1992 the Petitioner filed her motion for reconsideration with the Supreme Court of

Georgia. She also filed her enumerations of error with the Court of Appeals of the State of Georgia.

On approximately March 1st, 1992, the Petitioner filed her brief with the Court of Appeals.

On March 12th, 1992, the Supreme Court denied the Petitioner's motion for reconsideration.

On September 8th, 1992, the Court of Appeals found that the trial court properly granted the Respondents' motion to dismiss. They further took the position that the trial court did not rule on the Petitioner's contentions that O.C.G.A. 9-11-9.1 was unconstitutional thus claiming nothing for appellate review based on In Re Parrott, 194 Ga. App. 856, 392 SE2d 480 (1990).

The Court of Appeals found that the deposition of Dr. Benitez did not set forth specifically at least one negligent act or omission claimed, in accordance with their view of O.C.G.A. 9-11-9.1. They thus stated that the complaint originally filed was subject to be dismissed for noncompliance with O.C.G.A. 9-11-9.1.

The Court of Appeals found that paragraph (b) of O.C.G.A. 9-11-9.1 did not apply because the Petitioner did not allege the inability to submit the affidavit of Dr. Evangelista, with the originally filed complaint. The Court of Appeals did not address the uniqueness of the filing of the complaint within 10 days of the statute of limitations running, as specifically set out in the statute.

The Court of Appeals failed to permit any amendments to the complaint, although it is clearly the law to freely permit amendments to be filed in the State of Georgia, under O.C.G.A. 9-11-15. While the amendment itself may denoted the inability to file an affidavit of an expert, it was done so under O.C.G.A. 9-11-15 as an action of notice pleading of the additional sworn affidavit, adding as a 24th paragraph to the complaint and not to strike the submission of the expert affidavit submitted albeit a sworn deposition. The additional affidavit filed on August 7th, 1991 was done so under O.C.G.A. 9-11-15. Glaser v. Meck, 258 Ga. 468, 369 SE2d 912 (1988), and Patterson v. Douglas Women's Center, P.C., 258 Ga. 803, 374 SE2d 737 (1989). The Court of Appeals based their opinion on a case cited by the court of a

decision of the Supreme Court of Georgia, which was decided the same day as the Petitioner filed her original complaint within the 10 days prior to the statute of limitations running. Cheeley v. Henderson, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991). The Court of Appeals by holding to this position, permitted the application by the Trial Court to become in fact an adjudication not on the merits but, rather on the procedural hurdles. The ruling falls contrary to the title or the body of section 3, Georgia Laws 1987, pp. 887, 889-890, for there is no direction that a failure to comply with O.C.G.A. 9-11-9.1 sould result in an adjudication on the merits.

On September 24th, 1992, the Petitioner filed her motion for reconsideration with the Court of

Appeals. She stated that, the Cheeley case had been misconstrued as to the critical 10 day period. It was pointed out that the Court of Appeals was onerous on her to evaluate her expert affidavit albeit deposition, dismiss and re-file the case all within the 10 day period. As to the failure of the Court of Appeals to evaluate the constitutional question, the Petitioner addressed the mere case law position of In re Parrott, 194 Ga. App. 856 392 SE2d 480 (1990) which was a Criminal matter which was not on point for the record which the Trial Court had before it at the time it issued its Order. In fact, said case is easily distinguishable as follows: The case cited was a criminal matter as to the attempt of an incarcerated individual to change his name and the potential for confusion upon the general public. In

that case, the Appellant had not raised a constitutional issue at the trial level. In the instant case, the Petitioner raised the various constitutional questions, in her supplemental answer to the Respondents motion to dismiss. The Supplemental answer was filed with the Trial Court on September 11th, 1991, the Trial Court Granted the motion to dismiss, September 13th, 1991.

It was re-stated that the Trial Court had stated that it had ruled on the entire record of the court and based its entire order granting a motion to dismiss on the statute and its construction, thus implicitedly ruling on the constitutionality of the statute, whose question as to constitutionality had been raised by the Petitioner.

It is also noted that the Appellate

Court of In re Parrott, stated that the case turned on caselaw, Binford v. Reid, 83 Ga. App. 280, 63 SE2d 345 (1951), wherein the action of a Superior Court to grant or refuse a proper application to change the name of a person was based solely on sound legal discretion. The constitutionality of the statute had not been raised, and the Trial Court had not cited the statute as its reason for disallowing the name change but, rather the discretion of the court.

It was further noted that the court's use of the terminology of granting a summary judgment for the Respondents, the court had in fact ignored the res ipsa loquitur position as to the existence of a genuine issue of a material fact which needed to go to the trier of fact, the jury, to determine as

to the negligent act or omission taking place, violating the Petitioner's protection of the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States.

On October 1st, 1992, the Court of Appeals denied the Petioner's motion for reconsideration.

On October 6th, 1992, the Petitioner filed her notice of intent to apply for certiorari to the Supreme Court of Georgia.

On October 20th, 1992, the Petitioner filed her petition for certiorari to the Supreme Court of Georgia. She restated her position as to the constitutionality of the O.C.G.A. 9-11-9.1. She further asked the court to review the unique period of time as set

out by the legislature as to public policy for the period 10 days prior to the running of the statute of limitations. The March 13th, 1989 General Assembly Bill 329 adding paragraphs (e) and (f) are further distinguished by the opening statement of (e), "Except as allowed under subsection (b) of this Code Section..." (emphasis supplied) Paragraph (e) immediately negates itself wherein paragraph (b) is applicable and specifically the ten day period. The purpose of notice pleading and this statute is to make the parties aware of the negligence and omission involved. The apparent legislative purpose was administrative frugality, avoiding costly time and effort of the courts, to be expended by litigants in a professional malpractice action. The presentation of a prima facie case by

affidavit has been set solely as an administrative technique to have the parties ready on both sides from commencement of the action. In Brake v. Mintz, 193 Ga. App. 622, 666 (1989), the Court of Appeals dealt with the considerable uncertainty about when a Defendant should file an answer or even whether an answer is necessary until the Plaintiff supplements her pleading with the requisite expert's affidavit. To constur a further inability to amend a complaint or correct an incomplete or defective affidavit requirement, is a deprivation of due process. assuming arguendo the legislative ends are legitimate, it has to be shown that the very ends sought are not achieveable through less drastic methods. Struve, Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).

The State and Defenders of such a statute must prove that there does in fact exist a compelling state interest to restrict claimants' fundamental rights. Pyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

On September 8th, 1993, the Supreme Court of Georgia denied the Petitioner's petition for certiorari.

On September 17th, 1993, the certificate of counsel as to authenticity of the petition for certiorari based on the belief that the statute, the decision and actions of the courts overlooked the appropriate state and federal constitutional provisions and/or erroneously construed or misapplied them to the instant case. In addition, on the 17th of September, the Petitioner filed her motion for reconsideration with the

Supreme Court of the State of Georgia. In her motion, she stated that the actions of the courts to either erroneously construe or misapply O.C.G.A. 9-11-9.1 deals with the question of whether the Constitution of the State of Georgia of 1983 is unconstitutional as it sets out in the Preamble, to perpetuate the principles of free government and to promote the interests and happiness of the citizens of the State of Georgia without mention of its being subsidiary to the Constitution of the United States and specifically the Fourteenth Amendment thereof, and further lacking in any statements as to the powers of the state being set out and given by the Constitution of the United States.

The Petitioner further stated the issue of diversity as to the parties and

the actions of the courts to deprive her of the right of equal protection of the Constitution of the United States. It was noted that the Supreme Court of Georgia in Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991) 402 SE2d 269 (1991), citing Colonial Pipeline v. Brown, 258 Ga. 115, 365 SE2d 827 (1988), stated that: "Georgia citizens have greater rights and even more benefits than the Federal Constitution."

The Petitioner addressed the courts having abridged her right to a trial by jury, the trier of fact in her case.

The constitutionality of O.C.G.A. 9-11-9.1 was raised as to its legislative intent and the overbreadth of the statute. Further the issue as to administrative purpose of the statute which in fact was a defense in bar

without remedy, such over breadth and creation of a special class stealing the property rights of the Petitioner and thwarting her equal protection and right to due process under the Constitution of the United States. The Petitioner attempted to have the Supreme Court deal with the issue of whether there was in fact, a compelling rationale for the violation of fundamental rights.

On October 1st, 1993, the Supreme Court of the State of Georgia, denied the Petitioner's motion for reconsideration.

ARGUMENT FOR ALLOWANCE OF WRIT

This is a case involving the diversity of citizenship of the parties. While this case originated in a state court, the rights of all citizens of the United States are guaranteed by the

United States Constitution yet those of the Petitioner were abridged.

The Petitioner's right to a trial by jury, was arbitrarily torn from her by the trial judge, contrary to constitutional and statutory mandates.

The judicial review of the trial court's actions was tainted by the reading of the Constitution of the State of Georgia 1983, giving greater weight to the citizens of the state over those citizens of other states, coupled with the judicial record of and statements therein by the court of last resort for the State of Georgia, the Georgia Supreme Court, thus depriving the Petitioner of her United States Constitutional rights as a citizen, to equal protection, due process of law and protection of her property rights, sought to be addressed

by the court action as a plaintiff against the Respondents for a professional medical malpractice action committed against the Petitioner, endangering her life and future patients should this matter not be brought forward and addressed by the courts, in which the Petitioner was injured and lost personal property.

The uniqueness of this case, the geographics of the Petitioner's state of residence, Michigan, her personal doctor being of Michigan and the Petitioner's inability to prejudge within 10 days and the conservative approach to amend he complaint to add an aditional affidavit, has cost her to lose her right to trial. By her actions, she complied with the intent of the legislation and legislature.

O.C.G.A. 9-11-9.1 has created a

special class of medical professional individuals who have ability thru administrative hoops, to create a bar of court, violate the substantive rights of the Petitioner and similar situated individuals as guaranteed by the Constitution of the United States.

The State of Georgia, court of last resort has stated, "that the Georgia Constitution offers Georgia citizens greater rights and even more benefits than the Federal Constitution." Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991) 402 S.E.2d 269 (1991). The actions of the Georgia Supreme Court, in its ruling on this case shows it to be once again following the authority and/or its own interpretation of its state constitution versus the dictates of the United States Constitution as to state

rights and the rights of all citizens of the United States, and thus establishing lesser rights for noncitizens of the State of Georgia in its court. The Georgia Constitution wanes in its power and authority to the Fourteenth Amendment to the United States Constitution and as such this case is ripe for judicial review by this Honorable Court to the questions of conflict of authority and subsequent decisions.

CONCLUSION

For the reasons stated, the writ should be granted and the judgement of the Court of Appeals of the State of Georgia should be reversed and the case remanded to the trial court for a jury trial.

The Petitioner, Franklin M. Wright, as Administrator of the Estate of

Christine Wright, who past away September, 1992, respectfully prays that this Honorable Court Grant his petition for certiorari.

Date this 27th day of December, 1993.

Respectfully submitted,

Jonap & Associates, P.C.

Arthur C. Nilsen
Counsel for Petitioner
Franklin M. Wright,
Administrator of the Estate
of Christine Wright, Deceased

APPENDIX

Judgment of Trial Dated 9/13/91

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

CHRISTINE WRIGHT Plaintiff, v. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., WILLIAM A. DAVIS, M.D., DAVID GREEN, M.D., and CHRISTOPHER WALLS, M.D., Defendants.	)	Civil Action File No. # 134012

ORDER

Upon full consideration of the record, Defendant's Motion to Dismiss is hereby **GRANTED**.

Plaintiff filed this medical malpractice action against Crawford Long

Hospital as well as six doctors alleging that the Defendants failed to remove an introducer wire used during the insertion of a central line catheter in Plaintiff's body on July 4th, 1989. The Plaintiff filed with her Complaint a deposition of Pamela Benitez, M.D., however, the Complaint did not include the expert affidavit required by O.C.G.A. 9-11-9.1(a). Neither did the Plaintiff's complaint allege that due to time constraints an expert affidavit could not be prepared and that Plaintiff would need the extra 45 days permitted by O.C.G.A. 9-11-9.1(b).

On July 1, 1991, in an attempt to comply with the O.C.G.A. 9-11-9.1 requirement, the Plaintiff filed an amended Complaint stating that due to time constraints an expert witness

affidavit could not be prepared and filed contemporaneously with the Complaint. On August 7, 1991 a second amended Complaint was filed with the required expert affidavit attached.

We have no choice but to dismiss this Complaint for failure to fulfill the contemporaneous filing requirements. O.C.G.A. 9-11-9.1(e) Plaintiff's first and second amendments to the original Complaint cannot cure this defect.

Plaintiff responds to this Motion to Dismiss by contending that first, the statute does not by its terms require a contemporaneous allegation of unavailability and second, the deposition attached to the original Complaint was sufficient to satisfy the requirements of O.C.G.A. 9-11-9.1. With both these contentions, we disagree.

Section b of O.C.G.A. 9-11-9.1 states, "The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alledged that an affidavit of an expert could not be prepared." The language of the statute reads very clearly. The requirement that the Plaintiff allege that time constraints have prevented the contemporaneous filing of an affidavit with the Complaint is mandatory, not permissive.

The plaintiff's contention that the deposition attached to the original Complaint was sufficient to satisfy the affidavit requirements of O.C.G.A. 9-11-

9.1 must also fail. O.C.G.A. 9-11-9.1(a) states, "In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."

The deposition attached to Plaintiff's original Complaint does not set forth the factual basis for the claim of malpractice. In fact, the deposition never mentions the particular Defendants involved in this case, let alone the acts of negligence they are alleged to have performed. The deposition of Dr. Benitez merely states that an introducer wire was left in the Plaintiff's body and that

failure to remove this wire in a patient upon withdrawal of a CVP line violates the standard of care generally accepted in the community. Dr. Benitez never states that she has reviewed the work performed by the particular Defendants in this matter and that their acts or failure to act fell below the standard of care generally accepted in the community. Allowing this particular deposition to fulfill the requirements of O.C.G.A. 9-11-9.1 would undermine the public policy of the statute which is "to require the plaintiff to 'set forth the particulars of the claim'" in order to prevent frivolous or unsustaninable malpractice actions. (cits.) Cheeley v. Henderson, 197 Ga. App. 543 (1990) reversed on other grounds, _____ Ga. _____ (1991).

We therfore **GRANT** the Defendant's Motion for Summary Judgment and **DISMISS** the Plaintif's Complaint for failure to comply with O.C.G.A. 9-11-9.1.

This 13th day of September, 1991.

Signature Affixed
Joel J. Fryer
Judge, Fulton Superior Court

Supreme Court of Georgia Decision

Dated 2/12/92

In The Supreme Court of Georgia

S92A0520 Christine Wright v. Crawford Long Hospital of Emory University Et Al.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET AL.

From the SUPERIOR COURT of FULTON COUNTY.

There being no basis for jurisdiction in this Court, it is ordered that this appeal be hereby transferred to the Court of Appeals. Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham, Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme

Court of Georgia.

Witness my signature and the seal of said court affixed the day and year list above written.

(s/Lynn M. Stinchcomb, Deputy) Clerk.

Court of Appeals Decision Dated 9/8/92

In the court of Appeals of Georgia

A92A0964. WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY et. al. S-63

SOGNIER, Chief Judge.

Christine Wright brought a medical malpractice claim against Crawford Long Hospital and six physicians. Her complaint, as amended, was dismissed for noncompliance with OCGA 9-11-9.1, and she appeals.

In her complaint appellant alleged that defendants were liable for damages she incurred when an introducer wire was left in her body during catherization procedures performed in July 1989. Appellant attached to her complaint the deposition of Dr. Pamela Benitez, the surgeon who discovered and removed the wire in December 1989. In this

deposition, which was given in a Michigan lawsuit, Dr. Benitez testified that leaving a broken catheter threader wire in a patient's body violated the applicable standard of care. However, Dr. Benitez also stated that the wire she removed was not the kind of wire used to thread a catherization line and that she did not recognize the type of wire and was unable to identify a medical procedure in which such a wire would be used. In addition, Dr. Benitez testified that she had not reviewed appellant's medical records pertaining to the procedures performed by appellees and did not know the names of appellant's Georgia physicians.

Four days after filing her complaint, appellant amended it to allege that the statute of limitation would

expire within ten days of filing and that because of this time constraint she was unable to obtain the required affidavit before filing the complaint. Appellees raised the issue of noncompliance with OCGA 9-11-9.1 in their answers and motions to dismiss. In her second amendment to the complaint, filed 41 days after the complaint was filed, appellant attached the affidavit of Dr. Jose Evangelista, who averred that he had determined that appellees' treatment of appellant and had determined that appellees were negligent in failing to remove a catheter guide wire and in failing to so inform the appellant. The trial court dismissed the complaint on the basis that Dr. Benitez's deposition testimony did not satisfy the requirements of OCGA 9-11-9.1 (a) and that appellant could not amend the action

to add Dr. Evangelista's affidavit because the original complaint did not include the language required by OCGA 9-11-9.1 (b).

1. Contrary to appellant's contentions, the deposition did not meet the requirement of "set(ting) forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim, "OCGA 9-11-9.1 (a), as Dr. Benitez did not identify any negligent act committed by appellees and was unable even to speculate as to the source of the wire. See Piedmont Hospital, Inc. v. Milton, 189 Ga. App. 563, 564 (377 SE2d 198) (1988). Thus, the complaint as originally filed was subject to dismissal for noncompliance with OCGA 9-11-9.1.

2. Alternatively, appellant

contends she properly amended her complaint under OCGA 9-11-9.1 (b) or (c). The statute permits amendment of a complaint to add the required affidavit only in limited circumstances: (1) if the statute of limitation will expire within ten days and the plaintiff alleges that an expert affidavit could not be prepared because of time constraints (OCGA 9-11-9.1 (b)); or (2) if the court determines that the plaintiff was filed and the failure to file "was the result of a mistake" (id. at (e)). Paragraph (e) does not apply because Dr. Evangelista's affidavit was dated after suit was filed, and appellant does not contend the affidavit was available prior to filing. See Cheeley v. Henderson, 261 Ga. 498 (3) (405 SE2d 865) (3) (1991); compare Hospital Authority of Fulton County v. McDaniel, 192 Ga. App. 398 (385 SE2d 8)

(1989). Paragraph (b) likewise is inapplicable because appellant did not allege in her original complaint that she was unable to obtain an affidavit because of time constraints, but instead alleged that the requisite affidavit -- the deposition of Dr. Benitez -- was attached to and filed with the complaint, but the deposition was insufficient.

Appellant maintains that under the liberal amendment provisions of OCGA 9-11-15, she was entitled to amend her complaint to add the allegations required by OCGA 9-11-9.1 (b) and then to file a second amendment to add the affidavit as contemplated by paragraph (b). We disagree, for in Cheeley, supra, the Supreme Court held that the contemporaneous filing requirement is mandatory and that the contemporaneous

filing requirement is mandatory and that the filing of an insufficient affidavit cannot be cured by amendment unless the requirements of paragraph (e) are met. As the court noted, paragraph (e) expressly states that the failure to comply with the contemporaneous filing requirement cannot be cured by amendment under OCGA 9-11-15 unless the affidavit was available prior to the filing of the complaint but was not filed due to a mistake. Cheeley, supra at 499. The legislature clearly has limited the manner in which OCGA 9-11-15 is applied in malpractice cases and has authorized amendment only in certain limited circumstances not present here.

Although this court reached a contrary result in Thompson v. Long, 201 Ga. App. 480 (411 SE2d 322) (1991), that

case involved a pro se plaintiff and applied the less stringent pleading standard used in pro se cases but not applicable here. Moreover, the Thompson plaintiff clearly had intended from the outset to proceed under paragraph (b) -- ie., to file the complaint just before the statute of limitation expired and then to obtain and file the affidavit thereafter -- but neglected to add the "magic language" in her pleading, id. at 482, whereas here appellant originally filed a deposition she alleged met the requirements of paragraph (a). Thus, this case, like Cheeley, "involves the misinterpretation of OCGA 9-11-9.1 (a). . . . Because of the misinterpretation, the requisite affidavit (filed with the complaint) failed to comply with OCGA 9-11-9.1 (a)." (Punctuation and citation omitted.)

Cheeley, supra at 498 (3). Accordingly, the trial court properly granted appellees' motions to dismiss.

3. Since the trial court did not rule on appellant's contentions that OCGA 9-11-9.1 is unconstitutional, her enumerations on that issue present nothing for appellate review. In re Parrott, 194 Ga. App. 856 (392 SE2d 48) (1990).

Judgment affirmed. McMurray, P.J., and Cooper, J., concur.

Supreme Court of Georgia Decision

Dated 9/8/93

Case No. S93C0114
CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET. AL.

COURT OF APPEALS CASE NO. A92A0964

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunt, P.J., and Carley J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

Supreme Court of Georgia Decision

Dated 10/1/93

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S93C0114

CHRISTINE WRIGHT V. CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY ET. AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Hunt, P.J., and Carley, J., dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last

above written.

Sherie M. Welch, Clerk

Amendment 5 to the Constitution of the United States, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 7 to the Constitution of the United States, "In suits at common law, where the value in controversy shall

exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment 14, Section 1, to the Constitution of the United States, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws."

The Preamble of the Constitution of the State of Georgia of 1983, "To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon protection and guidance of Almighty God, do ordain and establish this Constitution."

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983, "No person shall be deprived of life, liberty, or property except by due process of law."

Article 1, S 1, P 2 of the Constitution of the State of Georgia of 1983,

"Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia of 1983, "(a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

Official Code of Georgia Annotated, Section 9-2-61, "**Renewal of case after**

dismissal.

(a) If a plaintiff discontinues or dismisses his case and recommences the same within six months, the renewed case shall stand upon the same footing, as to limitation, with the original case. However, this privilege of dismissal and renewal shall be exercised only once under this Code section.

(b) this Code section shall not apply to contracts for the sale of goods covered by Article 2 of Title 11."

Official Code of Georgia Annotated, Section 9-11-9.1, "**Affidavit to accompany charge of professional malpractice.**

(a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit

shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.

(c) If an affidavit is filed after the filing of a complaint, as allowed under

subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.

(d) This Code section shall not be construed to extend any applicable period of limitation.

(e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite

affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises failure to file such an affidavit in its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake."

Official Code of Georgia Annotated, Section 9-11-15, "**Amended and supplemental pleadings.**

(a) Amendments. A party may amend his

pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. such amendment of the pleadings as may be necessary to cause them to conform to the

evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arises out of the

conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable

notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

Official Code of Georgia Annotated, Section 9-11-38, "The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRANKLIN M. WRIGHT, Administrator Of The Estate of CHRISTINE WRIGHT, Deceased,

Petitioner,

v.

CRAWFORD LONG HOSPITAL OF EMORY UNIVERSITY, JOHN K. SCHELLACK, M.D., CHRISTOPHER DOOLEY, M.D., M. EDWYN HARRISON, III, M.D., DAVID A. DAVIS, M.D., DAVID GREENE, M.D., and CHRISTOPHER WALLS, M.D.,

Respondents.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the clerk of the Supreme Court of the United States, forty copies, and counsel for the Respondents in the

foregoing matter, a copy of the **PETITION FOR WRIT OF CERTIORARI**, by depositing same in the United States Mail in a properly addressed envelope, adequate postage thereon to:

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Dated this 22nd day of December, 1993

Jonap & Associates, P.C.

By: _____
Arthur C. Nilsen
Georgia State Bar # 538860

COUNSEL FOR PETITIONER
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Administrator Of The
Estate of Christine
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